

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**TIMOTHY WAYNE ABNER, et al.,
Grievants,**

v.

Docket No. 2019-0812-CONS

**DIVISION OF CORRECTIONS AND REHABILITATION/
BUREAU OF PRISONS AND JAILS/
NORTH CENTRAL REGIONAL JAIL AND CORRECTIONAL FACILITY,
Respondent.**

DECISION

Grievants,¹ employees of Respondent, the Division of Corrections and Rehabilitation (DCR), filed grievances against Respondent in January 2019. Their grievances were later consolidated under the current action. Grievants claim they were denied use of their accrued annual leave through executive orders issued by the Governor. Grievants seek compensation for or restoration of their lost annual leave.

The grievances were denied at level one. A mediation session was held on May 9, 2019. Grievants appealed to level three of the grievance process in September 2019. The parties requested a level three decision on the record and stipulated to findings of fact. Grievants were represented by Vincent Trivelli, Esq. Respondent was represented by Briana J. Marino, Assistant Attorney General. This matter became mature for decision on October 8, 2020. Each party submitted Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievants were employed as Correctional Officers by Respondent, the Division of Corrections and Rehabilitation, at all relevant times. Due to staffing deficiencies, the

¹Grievants include Nicholas Cooper, Jeffrey Carder II, Kevin Berish, and Robert Harris.

Governor issued two executive orders declaring a state of emergency in December 2017. One allowed Respondent to force Correctional Officers to work extra hours. The other suspended the Division of Personnel's Administrative Rule by allowing Correctional Officers unable to utilize accrued annual leave by the end of 2017, to carry it forward through the end of 2018. Due to continued staffing shortages in 2018 Grievants were unable to utilize some accrued annual leave and were prohibited from carrying beyond 2018 the leave exceeding the carryover limits under the Administrative Rule. Grievants contend they should be allowed to carryover the excess because the state of emergency was never terminated and the Administrative Rule is unconstitutional. While the undersigned lacks authority to invalidate the Administrative Rule, it does have the authority to determine whether it remains suspended through an executive order. Grievants failed to prove that the Administrative Rule remains suspended beyond 2018. Accordingly, this grievance is DENIED.

The following findings of fact have either been stipulated to by the parties or gleaned from the record.

Findings of Fact

1. Grievants are employed as Correctional Officers by Respondent, the Division of Corrections and Rehabilitation at the North Central Regional Jail and Correctional Facility and were so employed at the time of the actions grieved herein.

2. On December 22, 2017, the Governor Declared by Executive Order No. 12-17 a state of emergency due to the understaffing at detention and correctional facilities. In taking this action, the Governor found that West Virginia "is in a crisis in dealing with

the housing of individuals, adult and juvenile, both awaiting trial, and having been adjudicated.”

3. Executive Order No. 12-17 empowers the Secretary of the Department of Military Affairs and Public Safety (“DMAPS”)² to maximize staffing at juvenile and adult detention and correctional facilities until legislation and operational remedies could be developed and implemented.

4. On December 22, 2017, the Governor issued Executive Order No. 11-17 mandating that staff shall have all unused annual leave carried over through the end of 2018.

5. Executive Order 11-17 acknowledges that Respondent dealt with the staffing shortage at its facilities by denying or cancelling annual leave for some staff so it could utilize their services to ensure facilities were appropriately staffed.

6. Executive Order 11-17 states, in part, the following:

Notwithstanding West Virginia CSR § 143-1-14.3. a, and any other statute or Rule to the contrary, and pursuant to West Virginia Code § 15-5-6 (c)(7) and (8), all Correctional Officers, employees of Division of Corrections, Regional Jail and Correctional Authority, and Division of Juvenile Services, necessary to the safe and secure operation of the facilities, who are unable to use annual leave due to the emergency situation, and are subject to losing said annual leave, shall have all unused annual leave carry forward to and through calendar year 2018. **Said leave shall not expire until the end of calendar year 2018.**

(emphasis added)

²Now the Department of Homeland Security pursuant to S.B. 586, passed in the 2020 Regular Session of the West Virginia Legislature.

7. The executive orders have not been withdrawn, affirmatively voided, or extended beyond December 31, 2018.

8. None of Respondent's staff, including Grievants, were permitted to carry into calendar year 2019 any accrued annual leave in excess of the limitations placed thereon by the Division of Personnel's Administrative Rule. See W. VA. CODE ST. R. § 143-1-14.3.a (2016).

9. Grievants were full-time employees at North Central Regional Jail and Correctional Facility at all relevant times in 2018. In addition to their carryover leave from 2017, Grievants continued to accrue annual leave in accordance with the Division of Personnel's Administrative Rule in 2018.

10. During calendar year 2018, Grievants and other similarly situated employees, were denied use of accrued annual leave at various points throughout the year. Consequently, by the end of 2018, Grievants had accrued annual leave in excess of the carryover limits imposed by the Administrative Rule that they were unable to utilize.

11. As a result, Grievant Harris lost 61 hours, Grievant Berrish lost 100.57 hours, Grievant Cooper lost 179.92 hours, and Grievant Carder lost 125.27 hours of annual leave at midnight on December 31, 2018.

12. Grievants timely filed their grievances seeking reimbursement for the annual leave they had lost as a result of the accrued annual leave carryover limits set forth by the Division of Personnel's Administrative Rule and/or that Respondent had disallowed the use of in 2018 in conjunction with filling its staffing shortage.

13. Grievants and Respondent have incorporated into the stipulated record of this action all hearing documents, exhibits, testimony, and exhibits made in each of the

individual cases consolidated into the above-styled action as well as all documents exchanged during discovery.

14. During all times relevant to the grievances and Executive Orders described herein, North Central Regional Jail supplemented its staff with temporary duty officers from other regional jail facilities across West Virginia. In some instances, staffing shortages may have been the cause and/or a contributing factor for the denial of requests by officers to take annual leave in 2018.

15. The West Virginia Division of Corrections and Rehabilitation, formerly the West Virginia Regional Jail and Correctional Facility Authority, Division of Corrections, and Division of Juvenile Services, requested an executive order from the Governor's Office to allow employees to continue carrying into 2019 excess annual leave accrued above the limits set forth in the Division of Personnel's Administrative Rule so employees would have more time to utilize said leave. The Governor did not issue any subsequent executive orders related to accrued annual leave by DCR employees.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

The Governor declared a state of emergency through two executive orders issued in 2017 to deal with staffing shortages at detention and correctional facilities. The first, Executive Order 12-17, allows Respondent to force correctional officers and other staff to work extra hours in order to facilitate appropriate staffing levels. The second, Executive Order 11-17, allows correctional officers and staff to carry into and through the end of 2018 annual leave they had accrued in excess of the carryover limits put forth in the Division of Personnel's Administrative Rule. In so doing, Executive Order 11-17 suspended the portion of the Administrative Rule limiting carryover of excess annual leave from one year to the next. The section of the Administrative Rule related to annual leave sets forth a table that lists the maximum amount of annual leave an employee can carry forward from one year to the next based on their years of service. W. VA. CODE ST. R. § 143-1-14.3.a. (2016).

The parties agree that neither of the Executive Orders were ever withdrawn, affirmatively voided, or extended beyond December 31, 2018, and that Respondent denied Grievants and others the use of annual leave at various times throughout 2018 in furtherance of properly staffing facilities. Grievants contend they should have been allowed to carryover to 2019 the annual leave they had accrued in excess of the limits establish by the Administrative Rule. In support thereof, they argue that Executive Order 11-17 is still in effect because the state of emergency was never terminated. They further argue that, in preventing them from carrying excess leave into 2019, the Administrative Rule unconstitutionally deprives them of their pension rights. Respondent counters that Executive Order 11-17 only allows for the carryover of excess leave through the end of

2018 and that the Grievance Board does not have jurisdiction to bar any regulation as unconstitutional.

The undersigned does not have authority to declare the Administrative Rule invalid or unconstitutional. This Board is an administrative body which functions within the executive branch of state government. Therefore, the Grievance Board has no authority to declare legislation, or regulations which have been promulgated through the legislative rule making process invalid or unconstitutional. *Boyles v. Bureau of Employment Programs/Workers' Compensation Div.*, Docket No. 98-BEP-027 (July 15, 1998); *Wilson v. W. Va. Dep't of Tax & Revenue*, Docket No. 93-T&R-061 (Nov. 30, 1993). See *Akers v. W. Va. Dep't of Transp.*, Docket No. 89-DOH-605 (May 22, 1990). "An administrative agency is but a creature of statute, and has no greater authority than conferred under the governing statutes." *Monongahela Power Co. v. Chief, Office of Water Res., Div. of Env'tl. Prot.*, 211 W.Va. 619, 567 S.E.2d 629, 637 (2002)(citing *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 16, 483 S.E.2d 12, 16 (1996)). Consequently, the jurisdiction of the Public Employees Grievance Board is limited to the grant of authority provided in West Virginia Code § 6C-2-1, et seq.

However, the undersigned does have the authority to interpret Executive Order 11-17 and the Administrative Rule. The grievance process is available to adjudicate "a claim by an employee alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules or written agreements applicable to the employee including: (i) Any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination..." W. VA. CODE § 6C-2-2(i)(1).

Grievants contend that Executive Order 11-17 is still in effect since the state of emergency that necessitated the order still exists and the declaration thereof was never terminated. As such, they argue that Executive Order 11-17 can still be utilized to extend their ability to carryover excess leave into 2019. However, Executive Order 11-17 sets forth that “[s]aid leave shall not expire until the end of calendar year 2018.” Thus, while Executive Order 11-17 still technically lives on, it effectively expired through its own terms at the end of 2018. As for the Administrative Rule, Grievants do not allege a misinterpretation thereof. Grievants failed to prove that Respondent misinterpreted Executive Order 11-17 in declaring that it no longer suspended the Administrative Rule’s limitation on Grievants’ ability to carryover excess leave into 2019.

Accordingly, this grievance is DENIED.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). “The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not.” *Leichliter v. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

2. “An administrative agency is but a creature of statute, and has no greater authority than conferred under the governing statutes.” *Monongahela Power Co. v. Chief*,

Office of Water Res., Div. of Env'tl. Prot., 211 W.Va. 619, 567 S.E.2d 629, 637 (2002) (citing *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 16, 483 S.E.2d 12, 16 (1996)).

3. This Board is an administrative body which functions within the executive branch of state government. Therefore, the Grievance Board has no authority to declare legislation, or regulations which have been promulgated through the legislative rule making process invalid or unconstitutional. *Boyles v. Bureau of Employment Programs/Workers' Compensation Div.*, Docket No. 98-BEP-027 (July 15, 1998); *Wilson v. W. Va. Dep't of Tax & Revenue*, Docket No. 93-T&R-061 (Nov. 30, 1993). See *Akers v. W. Va. Dep't of Transp.*, Docket No. 89-DOH-605 (May 22, 1990).

4. While the undersigned does not have the authority to declare the Administrative Rule invalid or unconstitutional, Grievants did not prove by a preponderance of evidence a misapplication of the Administrative Rule.

5. "'Grievance' means a claim by an employee alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules or written agreements applicable to the employee including: (i) Any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination..." W. VA. CODE § 6C-2-2(i)(1).

6. Grievants did not prove by a preponderance of evidence that Executive Order 11-17 allowed them the ability to carryover excess leave into 2019.

Accordingly, the grievance is DENIED.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of

its administrative law judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The civil action number should be included so that the certified record can be properly filed with the circuit court. See *also* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: November 6, 2020

Joshua S. Fraenkel
Administrative Law Judge